WONG CHOONG FOR & ANOR.

v.

LAYANG REALTY SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM J.
[CIVIL SUIT NO. D4-22-2068-89]
6 APRIL 1994

PRACTICE & PROCEDURE: Order 18 r. 19 RHC - Application to strike out selected paragraphs of plaintiffs' statement of claim and for an order that the 2nd defendant cease to be a party to the action - 1st plaintiff purchasing house from 1st defendant - 1st plaintiff taking housing loan from 2nd defendant and executing a charge as security for the loan - 2nd plaintiff guarantor for the loan - Plaintiffs defaulting and 2nd defendant obtaining judgment in default against plaintiffs and order for sale of the property - Plaintiffs filing action for declarations that the loan, charge and guarantee was null and void - No application to set aside judgment in default - Whether Court has the jurisdiction to go behind a regular order - Contention that principle of res judicata applicable - Whether plaintiffs raised any issue not raised in earlier suit - Whether action time barred.

In 1980 the 1st plaintiff purchased a bungalow from the 1st defendant who obtained a housing loan from the 2nd defendant to pay for the bungalow. The 1st plaintiff executed a charge as security for the loan and the 2nd plaintiff guaranteed the loan. Subsequently the plaintiffs defaulted and the 2nd defendant filed suit and obtained judgment in default against the plaintiffs and eventually an order for sale of the property. The plaintiffs filed an action seeking declarations that the loan, the charge and the guarantee was null and void.

Counsel for the 2nd defendant submitted that as there were no applications to set aside the judgment, the Court had no jurisdiction to go behind a regular order. He contended that the principle of *res judicata* was applicable and further that the plaintiffs' claim was time barred as the cause of action started to run from the time of awareness which was late 1982 or early 1983. Counsel for the plaintiffs contended that *res judicata* was not applicable as the judgment in default was not a judgment decided on the merits. Counsel further contended that the 2nd defendant as end financiers had colluded with the 1st defendant on the basis that *inter alia*, the 2nd plaintiff's loan application and documentation were all prepared by one and the same entity and that the 1st and 2nd defendant had basically common directors. Counsel denied that the cause of action arose in 1982.

Held:

[1] It was immaterial whether the two defendants had common directors who dealt with the 1st plaintiff. This would not have altered the position even if it was brought up in the earlier suit. As for the allegation of conspiracy and fraud on the part of the defendants, even if this issue had been brought up in the earlier action, it also would not have altered the position.

[2] The plaintiffs should be estopped from proceeding as pleaded in the statement of claim because the matter had already been determined in the earlier suit. The plaintiffs' claim was therefore frivolous and vexatious and an abuse of the process of the Court.

[3] The cause of action must have commenced on or before 14 March 1983. The writ was filed on 27 September 1989. Therefore the suit was time barred under s. 6 of the Limitation Act.

[Application allowed with costs].

Cases referred to:
Veetak Enterprise Sdn. Bhd. v. The Kuala Lumpur Finance Bhd. [1987] 1 MLJ 407 ***(refd)***
Kok Hoong v. Leong Cheong Kweng Mines Ltd. [1964] 30 MLJ 49 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6
National Land Code, Chapter 3, Part 16
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Shasi Gangadharan; M/s. Thevin, Chandran & Wong
For the 2nd defendant - Benjamin Dawson; M/s. Nik Hussain & Partners

JUDGMENT

Dr. Zakaria Bin Mohd Yatim J:
This was an application by the second defendant for an order that:

(a) paragraphs 14 to 35 and paragraph 36(2) (a-g) of the statement of claim dated 26 September 1989 be struck out pursuant to paragraph (b) and/or (d) of O. 18 r. 19 of the Rules of the High Court and under the inherent jurisdiction of the Court;

(b) the second defendant be adjudged to cease to be a party in the action; and

(c) costs be granted to the applicant.

The grounds of the application were stated in the affidavit of Chin Yuen Chou, the Kuala Lumpur Main Branch Manager of the second defendant, affirmed on 23 February 1990 (Enclosure 7).

In 1980, the first plaintiff purchased a bungalow from the first defendant. He took a housing loan from the second defendant to pay for the bungalow. As security for the loan the first plaintiff executed a charge on 8 November 1982. The second plaintiff guaranteed the loan. Subsequently the first and second plaintiffs defaulted and the second defendant brought an action against them in 1986 culminating in an order for sale on 20 August 1987.

In their statement of claim the plaintiffs sought, *inter alia*, the following relief:

(a) a declaration that the loan granted to the first plaintiff and guaranteed by the second plaintiff was null and void;

(b) a declaration that the charge over the property known as HS(D) Nos. 3738 to 4010 from Lot Nos. 3657 to 3933 was unenforceable and null and void;

(c) a declaration that the guarantee dated 25 June 1982 was null and void; and

(d) a declaration that the judgment obtained in Civil Suit No. C2-23-3473-86 be set aside.

In his affidavit (enclosure 7) Chin Yuen Chou averred that the second defendant had *vide* Suit No. OS-31-1158-86 commenced foreclosure proceedings on the said property and had obtained an order for sale. He also averred that the second defendant had *vide* Suit C2-23-3473-86 obtained judgment in default against the plaintiffs on the outstanding sum due under the loan agreement and guarantee respectively. He also added that the plaintiff's action was time barred.

The order for sale dated 20 August 1987 stated as follows:

It Is Ordered that:

1. This property held under ... (D) 3774 No. P.T. ... Pasir Panjang together with all buildings and structure erected thereon charged to the plaintiff *vide* ... Presentation

No. ... Jilid 404 Folio 64 dated 13 December 1982 be sold by public auction pursuant to the provisions of Chapter 3, Part 16 of the National Land Code to satisfy the sum of RM234,756.22 as at 20 August 1987 and further interest thereafter at the rate of 18% per annum (RM122.20 per day) on the sum outstanding calculated effective from 21 August 1987 until date of full settlement and such other expenses thereof as the date of the order.

The judgment in default of appearance is reproduced below:

Civil Suit No. C2-23-3473-86

Between

Supreme Finance (M) Berhad ... Plaintiff

And

1. Wong Choon For
2. Wong Kem Chen ... Defendants

Judgment in Default of Appearance

No appearance having been filed by the 1st and 2nd defendants herein; **It Is This Day Adjudged** that the 1st and 2nd defendants do pay the plaintiff the sum of RM192,158.46 together with interest thereon at the rate of 19% per annum from 8 August 1986 to date of actual payment and costs RM225.

Dated the day of 13 November 1987.

Certified True Copy

Sgd.	Sgd.
.....	.....
Senior Assistant Registrar	Senior Assistant Registrar
High Court, Kuala Lumpur	High Court, Kuala Lumpur.

Mr. Benjamin Dawson, Counsel for the second defendant said that both the orders were made in default of appearance and there were no applications to set them aside. He submitted that the Court had no jurisdiction to go behind a valid and regular order. He added that the principle of *res judicate* applied to this case. According to him, the matters raised by the plaintiffs ought to have been raised in the earlier proceedings. He said that the plaintiffs had not alleged that the judgment in default was obtained by fraud.

Miss Shasi, Counsel for the plaintiffs contended that this was not a case to be labelled as *res judicata*. She said that the judgment in default of appearance obtained on 13 November 1987 was not a judgment decided on the merits.

Both Counsel referred to the Privy Council decision in *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* [1964] 30 MLJ 49. In that case Viscount Radcliffe at pages 53 & 54 said:

> ...that default judgments though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and ... they can estop only for what must 'necessarily and with complete precision' have been thereby determined ... What the respondent is now seeking to set up as part of his defence to the action based on the third agreement, that now in suit, is that the original agreement, out of which the others were formed was not in reality on hiring agreement for rent at all but a form of borrowing money on security... That is an issue which was not raised at all by the plaintiff in the action... [T]heir Lordships think it impossible to say that there was anything in the first judgment

a which 'necessarily and with complete precision' decided this issue against the respondent, and they hold consequently that the estoppel claimed cannot be maintained against it...

Miss Shasi relied heavily on the decision of Gunn Chit Tuan J., as he then was, in *Veetak Enterprise Sdn. Bhd. v. The Kuala Lumpur Finance Bhd.* [1987] 1 MLJ 407. In that case the learned Judge followed the principles laid down in *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* In his judgment at page 413, the learned Judge said, that the judgment in default obtained in the former action could not be said to have adjudicated upon any of the issues raised by the plaintiff in the case before him.

The question that arose here was whether the plaintiffs had raised any issue that was not raised in the earlier suit. According to Miss Shasi the plaintiff's claim against the second defendant was for breach of fiduciary duty as it occupied fiduciary position *vis-a-vis* the customer. She however did not have any authority to support her proposition. Miss Shasi contended that the second defendant as end financiers had colluded with the first defendant. She gave four reasons in support of her contention:

(a) The second plaintiff's loan application and documentation were all prepared by one and the same entity.

(b) The second defendant was the end financier. (Miss Shasi conceded that this was not mentioned in the affidavit).

(c) The first and second defendant had basically common directors.

(d) The first plaintiff alleged that when he knew that the project was not going to be completed as represented to him, he approached one of the common directors of the defendants who assured him that the project would be completed.

In my opinion it is immaterial whether the two defendants had common directors who dealt with the first plaintiff. This would not have altered the position even if it was brought up in the earlier suit.

In paragraph 26 of the statement of claim the plaintiffs alleged conspiracy and fraud on the part of the defendants. I have read paragraph 26 carefully, and I came to the conclusion that even if this issue as stated in paragraph 26 was brought up in the earlier action, it would not have altered the position.

In my opinion the plaintiffs should be estopped from proceeding as pleaded in the statement of claim because the matter had already been determined in the earlier suit. The plaintiff's claim was therefore frivolous and vexatious and it was an abuse of the process of the Court.

Mr. Benjamin Dawson also submitted that the plaintiffs claim was time barred. He said that the cause of action started to run from the time of awareness. He referred to Enclosure 7 exhibit JC5 paragraph 15 where the date given was late 1982 or early 1983.

Miss Shasi argued that the cause of action did not arise in 1982.

I found that the cause of action must have commenced on or before 14 March 1983. (Encl. 7 Exhibit JC5 paragraphs 16, 17, and 18). The writ was filed on 27 September 1989. In my view the suit was time barred, under s. 6 of the Limitation Act.

For the reasons stated above I made an order in terms of prayers (a), (b) & (c) of the application.